BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FILIBERTO SOTELO, Claimant, v. THE PILLSBURY COMPANY, Employer, and LUMBERMAN'S MUTUAL CASUALTY COMPANY, Surety, Defendants.	)	**IC 1997-006770** **1998-018735** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: May 24, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted an emergency hearing in Pocatello, Idaho, on October 28, 2003. Dennis R. Peterson of Idaho Falls represented Claimant. Eric S. Bailey of Boise represented Defendants. At issue in the 2003 hearing was whether Defendants were obligated to pay travel costs incidental to Claimant's out-of-area medical care and whether Defendants' refusal to pay such costs entitled Claimant to an award of attorney fees. In an Order dated January 16, 2004, the Commission ordered Defendants to pay Claimant's incidental travel costs and awarded attorney fees incurred in seeking the emergency hearing (Cal2004, 2004 IIC 0022).

On September 24, 2004, Referee Just conducted a second hearing on Claimant's case. Dennis R. Peterson of Idaho Falls continued to represent Claimant. Eric S. Bailey of Boise continued his representation of Defendants. At issue in the second hearing were unreimbursed costs for medical equipment and travel expenses, wrongful termination of total temporary disability benefits (TTDs), and entitlement to attorney fees. Subsequent to the hearing, but prior to entry of an Order, Defendants paid the unreimbursed medical and travel costs. In an Order dated January 19, 2005, the Commission determined that: Claimant reached medical stability on June 21, 2004, and no TTDs were owed Claimant after that date; Claimant was entitled to attorney fees incurred in seeking, preparing for, and participating in the September 24, 2004, hearing on the issue of unpaid medical reimbursements only, together with interest at the statutory rate on the delinquent reimbursements (2005 IIC 0020). Subsequent to the second hearing, Dennis Peterson withdrew as counsel for Claimant. Claimant eventually retained Greg J. Maeser as his attorney.

Referee Just conducted a third hearing, the subject of this decision, in Idaho Falls, Idaho, on October 27, 2006. Greg J. Maeser of Idaho Falls represented Claimant. Eric S. Bailey of Boise represented Defendants. The parties submitted oral and documentary evidence. The record remained open for the taking of one post-hearing deposition, and the parties submitted post-hearing briefs. The matter came under advisement on February 22, 2007, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether and to what extent the Claimant is entitled to the following benefits:

    A. Reimbursement for costs of medical care incurred by Claimant;

B. Permanent partial impairment (PPI);

C. Disability in excess of impairment (PPD); and

2. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine.

CONTENTIONS OF THE PARTIES

Claimant asserts that when his treating physician, Michael Coughlin, M.D., refused him further treatment and Surety failed to designate a new treating physician, he was entitled to seek appropriate care without the need for Surety approval. Claimant's visits to Leisure Yu, M.D., a California orthopedist, and general practitioners at the Shelley Medical Clinic (SMC) and the Blackfoot Medical Clinic (BMC) for on-going treatment for his left ankle are compensable, and he should be reimbursed for the cost of those visits.[1]

Claimant further contends that he is totally and permanently disabled as a result of his industrial injury, either because medical and other pertinent factors exclude him entirely from the job market, or so nearly exclude him from the job market as to make him an odd-lot worker.

Defendants argue that Dr. Coughlin did not relinquish Claimant's care, and that medical care sought by Claimant for his ankle was outside the chain of referral. Claimant neither requested, nor received authorization to seek medical care outside of the chain of referral once he stopped seeing Dr. Coughlin, and Defendants have no obligation to pay for care they were neither made aware of nor authorized.

Defendants further assert that while Claimant may have substantial disability in excess of his impairment, he is not totally and permanently disabled under either of the legal tests set out

[1] The record in this proceeding does not include any medical records from BMC, but does include one invoice. The invoice does not specify the services covered by the billing, so there is no evidence in the record that Claimant ever received any treatment at BMC that was related to his industrial injury.

under Idaho law.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony of Claimant and Mercy Sotelo, taken at hearing;

2. Joint Exhibits A through T, admitted at hearing;

3. Joint Exhibits 1 through 20, admitted at hearing;

4. Post-hearing deposition of Douglas N. Crum, CDMS; and

5. Industrial Commission legal file, including, but not limited to, the exhibits, testimony, decisions and orders entered in the two previous hearings.

All objections made during the deposition of Douglas N. Crum are overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND

1. At the time of the October 2006 hearing, Claimant was 49 years of age, and living in Shelley, Idaho, with his wife.

2. Claimant completed three years of schooling in Mexico. He came to the U.S. when he was twenty-four. He can read and speak Spanish. Claimant can neither read nor write in English. His ability to speak and understand English is in dispute. Recently he has attempted, but not completed, English as a Second Language courses at a local technical college. Claimant has poor math skills.

3. After coming to the U.S., Claimant first worked moving irrigation pipe. He then worked in potato warehouses until he went to work for Employer in 1990.

4. The first several years Claimant worked for Employer, he worked in the fresh-pack area, palletizing potatoes. Claimant then spent some time on a packaging production line before he became a drum attendant in the potato flake operation, the position he held at the time of his injury.

5. In 1999, The Pillsbury Company sold the Shelley facility to Basic American Foods (BAF). Claimant continued to work for BAF, which is not a party to this proceeding, until his fusion in November 2003. Claimant did not return to work after his fusion, and was eventually terminated by BAF.

MEDICAL RECORDS

Claimant's medical history relating to his work accident is lengthy, and only relevant portions will be repeated here. Some of Claimant's medical history is discussed in prior decisions in this proceeding, and much of his early treatment is not relevant to the issues presently before the Commission.

Michael J. Coughlin, M.D.

6. In November 2003, Michael J. Coughlin, M.D., fused Claimant's left ankle. This was the fifth and final surgical procedure on Claimant's left ankle precipitated by his original 1997 industrial injury.

7. By May 2004, approximately six months after his surgery, Claimant had a solid fusion in a neutral position with good alignment. At that time, Claimant reported pain in the area of the distal fibula, in the medial and lateral subtalar joint, the anterior ankle, and in the medial malleolar region. Claimant denied significant swelling. Claimant had completed physical

therapy, and Dr. Coughlin had recommended a gradual return-to-work/work hardening procedure whereby Claimant would return to light duty work for two hours per day for two weeks, four hours per day for two weeks, six hours per day for two weeks, and then regular eight-hour days.

8. Dr. Coughlin imposed a twenty-pound lifting restriction for two months, followed by a permanent one hundred pound lifting restriction. Claimant was permanently restricted from climbing ladders, and was permanently prohibited from frequent stair climbing. Dr. Coughlin prescribed high-topped Redwing boots for Claimant to wear instead of a brace. Dr. Coughlin recommended that Michael T. Phillips, M.D., rate Claimant's permanent impairment. Dr. Coughlin's chart note from May 11, 2004 concludes, "[Claimant] will not be fully released until we have a game plan from the surety." Exhibit D, p. 268. Claimant did not return to see Dr. Coughlin after May 11, 2004.

Michael T. Phillips, M.D.

9. As recommended by Dr. Coughlin, Dr. Phillips re-examined Claimant on June 22, 2004.[2] Claimant complained of constant left ankle pain, localized to the medial and lateral malleolus and in the area of the Achilles tendon insertion. He also reported daily swelling of the ankle.

10. On exam, Dr. Phillips observed a variable limp involving the left lower extremity, which improved with distraction. Dr. Phillips also noted left calf atrophy as evidenced by a three-centimeter differential between the left and right calf measurements. Dorsiflexion and plantar flexion of the left ankle were non-existent post-fusion. Inversion and eversion were unrestricted on the right, but Dr. Phillips could not record a range of motion for inversion and

[2] Dr. Phillips had done an earlier independent medical evaluation (IME) of Claimant on May 5, 2003, prior to his left ankle arthrodesis.

eversion on the left because of a poor effort by Claimant. Dr. Phillips noted no deformity of the left hindfoot or forefoot in a weight-bearing stance.

11. Dr. Phillips found Claimant to be at maximum medical improvement (MMI) with regard to his industrial injury, and opined that he could return to gainful employment. Dr. Phillips withheld judgment on whether Claimant could return to his time-of-injury position pending review of a jobsite evaluation.

12. Dr. Phillips rated Claimant's permanent partial impairment using the *AMA Guides To The Evaluation of Permanent Impairment*, (5th Ed.) (*AMA Guides)*. The *AMA Guides* provide a 4% whole person impairment for a fused ankle in the neutral position (*See,* p. 541). Table 17-6, p. 530, provides ratings for unilateral leg muscle atrophy and identifies differences of three centimeters or greater as a severe impairment and a rating of 5% of the whole person. Combining the two ratings by adding them together, Dr. Phillips found a whole person permanent impairment of 9%. This rating was inclusive of all previous ratings.

13. Dr. Phillips imposed permanent restrictions on Claimant, including: No prolonged standing or walking, avoid walking on uneven ground, limited climbing only. Dr. Phillips did not include any weight-related restrictions regarding lifting and carrying.

14. Dr. Phillips examined Claimant once again on April 19, 2006. At that time, Dr. Phillips had access to Claimant's medical records from other providers, including the Shelley Medical Clinic (SMC) and Dr. Leisure Yu.[3] Claimant reported constant pain over the medial and lateral aspect of the left ankle, with the pain radiating to his hip. Claimant also reported swelling if he stood or walked for more than thirty minutes. Claimant had new reports of medial and lateral subpatellar pain in the left knee with minimal swelling, and some crepitus, as well as

[3] These medical records are discussed in a subsequent portion of these findings.

pain and swelling over the left anterior iliac spine and sacroiliac articulation.

15. On exam, Dr. Phillips noted some atrophy in the left thigh, less atrophy in the left calf than seen previously, and increased circumference in the left ankle. Again, Claimant had no dorsiflexion or plantar flexion in the fused ankle and normal inversion and eversion in the right ankle and range of motion limited of ten degrees on the left. Again, Dr. Phillips noted that Claimant exerted only minimal effort in left ankle range of motion testing.

16. Dr. Phillips found Claimant's permanent impairment unchanged at 9% of the whole person. He did clarify some of the restrictions he had previously imposed, limiting Claimant to standing or walking no more than one hour at a time with a break every fifteen minutes. Once again, Dr. Phillips did not include weight restrictions for carrying or lifting activities.

Leisure Yu, M.D.

17. On May 24, 2004, Claimant sought a consultation with Dr. Yu, an orthopedist located in Loma Linda, California. When asked how he came to see Dr. Yu, Claimant testified that his daughter found Dr. Yu on the Internet. In his written report, Dr. Yu identified the records he reviewed as part of the consultation. The records were limited to one pre-fusion chart note from Dr. Coughlin, the May 11, 2004, chart note from Dr. Coughlin, the notes from Industrial Commission Rehabilitation Division (ICRD) rehabilitation consultant Dan Wolford, one physical therapy note from March 24, 2004, and two letters dated September 11, 2003, from Claimant's then counsel, Dennis R. Peterson, to Defendants' counsel, Eric S. Bailey.

18. Claimant's subject complaints included "intermittent pain and discomfort with pain level increasing to 5-6 out of 10. At the end of the day his pain level increases slightly higher. He complains of swelling, difficulty walking and intermittent pain." Exhibit H, p. 328.

19. On exam, Dr. Yu observed a slight stiff gait on the left leg consistent with an ankle fusion. Range of motion of the ankle and foot was normal on the right, zero dorsiflexion and plantar flexion on the left, and inversion and eversion on the left foot limited to five degrees in either direction. Dr. Yu observed slight atrophy of the left calf, and measured a .75 centimeter differential between the left and right calf. Dr. Yu described the radiographic findings:

> Left ankle fusion in excellent position with good orthopedic implants in excellent position. The fibula healing to the tibia and the talus is also complete.

Id., at p. 330.

20. Based on Claimant's history, the physical examination, and a limited record review, Dr. Yu made several recommendations:

- Claimant should not be employed in general heavy duty labor;
- Claimant should seek work that allows him to intermittently sit, stand and walk;
- Claimant should not push, pull or lift on a repetitive basis objects weighing more than ten pounds;
- Claimant cannot squat, deep knee bend, or climb ladders;
- Claimant should wear a rocker bottom sole shoe to help him ambulate with the fused ankle.

21. Dr. Yu also noted that Claimant asked for an IME evaluation and rating, which the doctor declined to provide because he had not received an official request from Surety or Claimant's counsel and because he did not have relevant medical records.

22. Dr. Yu subsequently received a letter from Dennis Peterson, requesting that he conduct an IME of Claimant. Dr. Yu first prepared a medical record review that he transmitted to Mr. Peterson by letter dated August 16, 2004. Notably absent from the medical record review were any records from Dr. Coughlin subsequent to January 28, 2003—all of Dr. Coughlin's

records regarding the ankle fusion and related post-operative care.

23. On August 23, 2004, Dr. Yu saw Claimant for the purpose of conducting the IME. Claimant's chief subjective complaint was "left ankle pain, discomfort and loss of range of motion." *Id.*, at p. 315.

24. As noted in the Commission's previous decision (2005 IIC 0020 at page 0025), there was no real change in Claimant's condition between his May 24, 2004, visit with Dr. Yu and the August 23 IME appointment. It does appear that sometime between Claimant's May and August visits to Dr. Yu, he began taking narcotic pain medication in addition to ibuprofen for his pain complaints. It is not clear who prescribed the narcotic analgesics, as there is no record of any prescription for narcotics until SMC wrote several such prescriptions on December 10, 2004.

25. Dr. Yu used the *AMA Guides* to rate Claimant's permanent impairment. In particular, he relied on table 17-5, p. 529, which uses gait derangement as the basis of impairment. Dr. Yu considered Claimant's high-top work boot to be the functional equivalent of a short leg brace (ankle-foot orthosis), which provides a whole person impairment of 15%. Dr. Yu asserted that using this measure of impairment takes into account muscle atrophy, loss of muscle strength, and loss of range of motion caused by the left ankle arthrodesis.

26. Dr. Yu provided the following permanent work restrictions:

- No pushing, pulling or lifting on a repetitive basis any objects weighing more than ten pounds;
- No squatting, deep knee bends or ladder climbing; and
- Intermittent sitting, standing, and walking.

27. Dr. Yu also opined that Claimant would require "life-time medical care to cure and relieve the effects of the industrial injury." *Id.*, at p. 318. In particular, Dr. Yu

recommended either a high-top boot or an ankle foot orthosis for the left side; a rocker bottom sole on his left shoe to simulate normal heel-strike and toe-off motion; pain medication; and occasional physical therapy.

28. A copy of Dr. Yu's report was forwarded to Dr. Coughlin. By letter dated September 1, 2004, Dr. Coughlin opined to Defendants' counsel regarding Dr. Yu's IME. Dr. Coughlin noted that Dr. Yu did not have all of the relevant medical records, but that his examination of Claimant was comprehensive. In summary, Dr. Coughlin agreed that: Claimant could not be employed in heavy labor; he needed work that would allow him to intermittently sit, stand, and walk; would benefit from a shoe with a rocker-bottom sole; and should not squat, deep knee bend, or climb ladders. Dr. Coughlin disagreed with Dr. Yu that Claimant should have a ten-pound limit on pushing, pulling, and lifting. Dr. Coughlin stated that with a successful ankle fusion, Claimant should easily be able to lift up to fifty pounds when completely recovered.

29. Claimant continued to seek care from Dr. Yu. On February 21 and 22, 2005, Claimant underwent a functional capacity evaluation (FCE) by Physiotherapy Associates of Loma Linda, California, upon referral by Dr. Yu. The evaluator believed that the FCE results were valid and that Claimant had demonstrated consistent effort. The FCE indicated that Claimant could not return to his time-of-injury job. The summary of Claimant's physical capacities included:

Continuously:

- Twisting from a sitting position;
- Elevated work without lifting;
- Gripping with either hand;
- Hand coordination and fine manipulation or fingering.

Frequently:

- Stand and walk with breaks after fourteen minutes;

- Bending from a standing position
- Twisting from a standing position;
- Overhead lifting of two pounds or less.

Occasionally:

- Lifting five pounds;
- Lifting five pounds overhead.

Rarely:

- Stair climbing;
- Lifting ten pounds.

Never:

- Climbing ladders;
- Stooping and crouching;
- Dynamic and static push/pull.

30. On February 23, 2005, Dr. Yu wrote to Mr. Peterson summarizing the results of the FCE. In his letter, he suggested that a TENS unit might be helpful.

31. Dr. Yu next saw Claimant on August 8, 2005. Claimant's condition was unchanged. The chart note for that visit includes, for the first time and without explanation, a diagnosis of lower left extremity RSD (reflex sympathetic dystrophy). On Claimant's next visit, November 14, 2005, Claimant's condition was unchanged. Dr. Yu prescribed physical therapy, Naprosyn, and recommended Claimant continue taking Vicodin for his pain complaints. Dr. Yu examined Claimant again on February 16, 2006. Claimant's condition was unchanged. Dr. Yu wrote prescriptions for a TENS unit and prescribed ibuprofen and hydrocodone. Claimant's last documented visit with Dr. Yu was July 17, 2006. His condition was unchanged. Dr. Yu wrote a prescription for Naprosyn.

Shelley Medical Clinic

32. Claimant received on-going general medical care from SMC dating back to at least January 1996. Subsequent to his left ankle fusion, notes regarding Claimant's ankle

complaints start appearing in the chart notes from SMC. On May 25, 2004, Claimant was being seen for an unrelated condition, but the chart note documents no swelling of the extremities, normal range of motion except for the fused ankle, and use of ibuprofen related to the fusion. On August 10, Claimant sought treatment for an unrelated condition and also complained of ankle pain, popping, and swelling. On exam, some tenderness was noted, but no swelling or effusion. On December 10, Claimant presented at SMC complaining of ankle pain. Previous treatment notes indicate use of Vioxx, Bextra, and Relafen without improvement, but pain is improved with pain medication. On exam, slight swelling was noted around ankle joint. Claimant was given prescriptions for Daypro, Lortab, physical therapy, and a rocker soled shoe.

33. In July 2005, Claimant returned to SMC complaining of ankle pain. Minimal swelling was noted. Prescriptions for Lodine, Lortab, a rocker-soled shoe, physical therapy, and a TENS unit were given.

VOCATIONAL EVIDENCE

Nancy Collins, Ph.D.

34. Claimant retained Nancy Collins, Ph.D., to prepare a vocational assessment and render an opinion on Claimant's vocational disability. Dr. Collins met with Claimant on November 23, 2004, and her report is dated December 28, 2004. Without conducting a side-by-side comparison, it appears that Dr. Collins had an opportunity to review the medical records and other records that were extant at that time. Dr. Collins reviewed the restrictions placed on Claimant by Drs. Coughlin, Phillips, and Yu. She determined that the restrictions placed Claimant in either sedentary or light physical exertion categories, depending upon which

restrictions were used.[4] Describing Claimant's previous work history as unskilled or semi-skilled, and using software that accounts for exertion level, transferable skills, and the dictionary of occupational titles, Dr. Collins computed the number of job titles that were available to Claimant under the various scenarios:

	Pre-injury	**Post-injury**	
		Light	***Sedentary***
Semi-skilled	28	7	0
Unskilled	3038	1495	125

Dr. Collins' analysis resulted in a 51% loss of access to the labor market for light, unskilled work, a 75% loss of market access for light, semi-skilled work, a 96% loss of access for unskilled sedentary jobs, and a 100% loss of the labor market for semi-skilled sedentary jobs.

35. Dr. Collins also opined that Claimant would suffer a substantial loss of earning power. At the time he was terminated by BAF, Claimant was earning $12.80 per hour. If he were able to find work, Claimant could expect to make $6.00 to $7.00 per hour.

36. Dr. Collins concluded:

> Without some improvement in his English, the ability to read at least basic instructions and write enough to fill out forms, he will have a very difficult time finding any work. Most jobs that do not require this language level are heavy physical jobs that are no longer available to [Claimant]. He would also benefit from taking some basic computer classes, as most work environments will require basic computer usage. In order for him to improve his earning capacity, he will need either on the job training to acquire a lighter skill or some kind of formal training.

Ex. J, p. 008.

[4] Dr. Collins' analysis assumes that Claimant was in a sedentary or light work category, depending upon the restrictions used. Her analysis does not appear to recognize that Dr. Coughlin opined that Claimant could lift and or carry up to fifty pounds, and Dr. Phillips imposed no weight-based lifting or carrying restrictions.

Lori Gentillon

37. Claimant participated in a week long in-house vocational evaluation performed by Lori Gentillon of Development Workshop, Inc. Ms. Gentillon conducted an extensive battery of tests. She concluded that Claimant has "very limited English reading or writing skills." Ex. N., p. 003, and that there are very few job matches given Claimant's aptitudes, preferences, and skills when he has a ten-pound lifting limit. When the lifting restriction is raised to twenty pounds, a number of job matches do occur. Ms. Gentillon recommended vocational rehabilitation to upgrade Claimant's work skills, improve his ability to communicate in English, and help him identify suitable occupational goals.

Douglas N. Crum, CDMS

38. Defendants retained Douglas Crum to prepare a disability evaluation for purposes of these proceedings. Without making a page-by-page comparison, it appears that Mr. Crum had access to the relevant records, including medical records, Dr. Collins' report, materials from Developmental Workshop, Inc., the transcript from the September 24, 2004 hearing, and the January 19, 2005 decision by the Commission. Mr. Crum met with Mr. Sotelo on January 25, 2005.

39. Mr. Crum issued his report on September 19, 2006. Mr. Crum's review of Claimant's work history, medical history, educational history, and transferable skills is consistent with the information contained in Dr. Collins' report and, generally, with the testing performed by Development Workshop, Inc. In one notable respect, Mr. Crum's report differs from the opinions of both Dr. Collins and Ms. Gentillon—Mr. Crum is of the opinion that even if Claimant cannot read and write in English, his ability to speak and understand English is far better than reported. In particular, Mr. Crum observed that he and Claimant communicated in

English, and the record reflects that Claimant and his attorney communicated in English, and Industrial Commission Rehabilitation Division (ICRD) consultant, Dan Wolford, communicated with Claimant in English.

40. Mr. Crum analyzed Claimant's disability in excess of his impairment using the restrictions imposed by Drs. Coughlin, Phillips, and Yu. Mr. Crum's analysis regarding loss of access to the labor market under each of the three sets of restrictions were as follows:

Physician	Loss of Access to Labor Market
Dr. Coughlin	25%
Dr. Phillips	50%
Dr. Yu	75%

41. Combining loss of access and loss of wage earning capacity[5] under each set of restrictions, Mr. Crum determined Claimant's total disability, inclusive of impairment, as follows:

Physician	Permanent Disability Inclusive of Impairment
Dr. Coughlin	40%
Dr. Phillips	50%
Dr. Yu	65%

42. Mr. Crum also reviewed information regarding Claimant's job search. Claimant's job search began in December 2004—the same time he began receiving unemployment benefits. Claimant reported to Mr. Crum that he had to apply for roughly two jobs per week to remain eligible for unemployment benefits. Mr. Crum concluded that Claimant's job search was nominal, and clearly intended primarily to meet the job-search requirements needed to assure his

[5] Mr. Crum noted in his report that Dr. Collins based her computation of loss of earning capacity on Claimant's wage at the time he was terminated by BAF. Mr. Crum correctly notes that Claimant's time-of-injury wage with the time-of-injury employer was $10.09--$2.71 less than he was making six years later, when he was terminated by a subsequent employer.

receipt of unemployment benefits. Mr. Crum also noted that Claimant stressed his perceived restrictions, more onerous than those imposed by any of his physicians, to potential employers.[6] Claimant's job search ended about the same time he met with Mr. Crum on January 25, 2005.

CREDIBILITY

43. Over the lengthy course of these proceedings, the Referee had ample opportunity to observe Claimant and his wife during all aspects of the proceedings.

While Claimant's wife is not legally a party to this proceeding, it is evident that she is, from a practical standpoint, in charge of her husband's claim. The record is replete with documentation regarding Ms. Sotelo's direct personal involvement with virtually every aspect of the claim and with nearly every individual who has been involved with it. The Referee notes, in particular, that Claimant's wife is the only active participant in a workers' compensation proceeding who ever managed to contact the Referee directly on her unpublished telephone line and attempted to initiate *ex parte* contact about the proceedings.

It became apparent to the Referee during the course of the proceedings that Claimant's testimony was not so much his own story as it was the story that Ms. Sotelo required him to tell. Ms. Sotelo was the dominating force in these proceedings, and her actions and decisions were often at odds with what she testified were her desired outcomes. Ms. Sotelo was not a credible witness, and to the extent that Claimant's testimony was influenced by his wife, its reliability is diminished.

Additionally, Claimant's view of his condition as evidenced by his testimony and reports to his physicians is markedly different than the view of his condition as gleaned from the record in this proceeding, and no compelling medical explanation or diagnosis helps to reconcile the

[6] There was extensive testimony regarding Claimant's need to elevate his left foot whenever he was seated, a limitation not supported by the medical records.

disparity.

DISCUSSION AND FURTHER FINDINGS

ENTITLEMENT TO MEDICAL BENEFITS

44. An employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

45. Claimant asserts that once Dr. Coughlin relinquished Claimant's care, he was entitled to seek his own treatment at Employer's expense. Claimant's claim for additional medical benefits fails for several reasons.

First, the record is clear that Dr. Coughlin did *not* relinquish Claimant's care. In fact, Dr. Coughlin's chart note was quite clear that Claimant was *not* released from care as of May 11, 2004, the last time that Dr. Coughlin saw Claimant. Subsequently, Dr. Phillips saw Claimant, gave him a rating, and released him to return to modified work.

46. As Defendants pointed out in their brief, Claimant had fought long and hard to be treated by Dr. Coughlin in Boise, even though there were qualified orthopedists in eastern Idaho who could have provided the treatment Claimant needed. The reasons that Claimant was authorized to have Dr. Coughlin perform his fusion are set forth with particularity in this

Commission's 2003 decision, and are unique to those facts. In particular, Surety had previously authorized Dr. Coughlin to perform Claimant's Carticel implant, and Dr. Coughlin was still Claimant's treating physician when Surety first authorized the fusion.

While Claimant was still under Dr. Coughlin's care following the fusion, Claimant inexplicably, and without notice to Defendants, or even his own attorney, began receiving treatment for his ankle from his doctor at SMC. Concurrently, and again without informing Defendants, Claimant started traveling to California to see Dr. Yu.[7]

47. Once Claimant decided he was done with Dr. Coughlin, he was not free to seek additional care anywhere and with anyone he chose. As evidenced by the record in this proceeding, Claimant, and those who advocated on his behalf, were anything but reticent in making demands on everyone involved with Claimant's case, yet Surety was never contacted with a request for additional treatment. It was not by accident that Defendants were unaware that Claimant was obtaining treatment in both Shelley and Loma Linda for his ankle.

48. Claimant had not been denied medical care before he sought treatment with SMC or Dr. Yu, so Defendants are not liable for any of the medical costs Claimant incurred in seeking such treatment.

ON-GOING MEDICAL CARE

49. While Defendants are not liable for the treatment provided in the past by Dr. Yu and SMC, the medical records do suggest that Claimant may have some need for on-going care, including pain medications or devices and orthoses. While admittedly outside the scope of this proceeding, the Commission suggests that Defendants may wish to designate an orthopedist in

[7] The relevant chart notes indicate that Claimant received duplicate prescriptions for anti-inflammatory drugs, narcotics, a TENS unit, and orthoses related to his ankle fusion from *both* medical providers.

eastern Idaho to act as Claimant's treating physician with regard to his ankle fusion. The number and type of duplicate prescriptions provided Claimant by Dr. Yu and SMC are a matter of some concern. Furthermore, Claimant's compliance with the orders of his doctors could be better monitored if all treatment for his ankle were handled by a single provider. Had Claimant filled every prescription he received for a high-top boot with a rocker-bottom sole, he would have a closet full of them. Yet, on each and every occasion that the Referee had an opportunity to observe Claimant, he was wearing tennis shoes.

IMPAIRMENT

50. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

51. It is undisputed that Claimant has some permanent impairment as a result of his fusion. Claimant's whole person impairment ranged from 9% as calculated by Dr. Phillips, to 15% as calculated by Dr. Yu. Both physicians used the *AMA Guides* in making their determinations, but they used different methodologies. Dr. Yu based his rating on Claimant's gait derangement resulting from his fusion, whereas Dr. Phillips used the rating for a fused ankle

in a neutral position (a successful fusion) plus a rating for unilateral atrophy of Claimant's leg muscle measured at the calf. A review of the *AMA Guides* indicates that rating should be based on gait derangement *only* when an injured worker is dependent upon an assistive device, and should *only* be used when a more specific method is not available. Dr. Yu was of the opinion that the use of a high top boot with a rocker bottom sole was the equivalent of a short leg brace or assistive device. A careful application of the *AMA Guides* suggests that Dr. Yu's rating overstates Claimant's impairment where he clearly is not *dependent* upon an assistive device, and the gait derangement methodology is not a favored approach.

52. Dr. Phillips' rating may also overstate Claimant's impairment slightly because the medical records demonstrate substantial variability in the amount of unilateral atrophy in Claimant's left calf. Dr. Phillips initially measured a 3 cm difference, but later measured a smaller differential and Dr. Yu only noted a .75 cm difference. While a 3 cm difference results in an impairment of 5%, a .75 cm difference results in no additional impairment. Dr. Phillips' methodology is clearly the one preferred by the *AMA Guides,* and the Commission will not second-guess Dr. Phillips' assessment. The Referee finds that Claimant has 9% whole person impairment, inclusive of all previous impairments, for his fused ankle.

DISABILITY

53. The definition of "disability" under the Idaho workers' compensation law is:

> . . . a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). A permanent disability results:

> when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected.

Idaho Code § 72-423. A rating of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors. Idaho Code § 72-425. Among the pertinent nonmedical factors are the following: the nature of the physical disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the commission. Idaho Code § 72-430.

The burden of proof is on the claimant to prove disability in excess of impairment. Expert testimony is not required to prove disability. The test is not whether the claimant is able to work at some employment, but whether a physical impairment, together with non-medical factors, has reduced the claimant's capacity for gainful activity. *Seese v. Ideal of Idaho*, 110 Idaho 32, 714 P.2d. 1 (1986).

Disability in Excess of Impairment

54. The parties are generally in agreement that Claimant has disability in excess of his impairment, and that his disability may be substantial. Opinions concerning Claimant's disability in excess of impairment are dependent upon who is offering the opinion and which set of restrictions are used to evaluate loss of access to the job market and loss of wage earning capacity.

55. Dr. Collins. Dr. Collins did not calculate an overall disability percentage for Claimant. She calculated 51% loss of access to the labor market for light, unskilled work, a 75% loss of market access for light, semi-skilled work, a 96% loss of access for unskilled sedentary jobs, and a 100% loss of the labor market for semi-skilled sedentary jobs. These figures

purported to take into account the three different sets of restrictions imposed by Drs. Coughlin, Phillips, and Yu, and also took into account that Claimant had done semi-skilled and unskilled work in the past. However, these calculations appear to be based on Dr. Yu's restrictive lifting limitations, and don't consider Dr. Coughlin's fifty pound limitation or the fact that Dr. Phillips imposed no weight-related restrictions. She separately determined loss of earning capacity to be from $12.80 an hour to $6.00 or $7.00 per hour (a percentage loss of between 45% and 53% of earning capacity). As noted previously, Dr. Collins erroneously used Claimant's time of termination wage, not his time of injury wage, to calculate his loss of earning ability. Correcting for his time-of-injury wage of $10.09 per hour, his actual percentage loss of earning capacity ranges from 31% to 41%.

56. Doug Crum. Doug Crum provided his calculation of disability in excess of impairment for each set of restrictions imposed by Drs. Coughlin, Phillips, and Yu. Using Dr. Coughlin's restrictions, Mr. Crum determined Claimant's disability to be 40%, inclusive of impairment. Using Dr. Phillips' restrictions, Mr. Crum determined Claimant's disability to be 50% inclusive of impairment. And using Dr. Yu's restrictions, Mr. Crum determined Claimant's disability to be 65% inclusive of impairment.

57. Lori Gentillon. Although Lori Gentillon conducted extensive testing of Claimant, she did not offer any opinion as to his disability in excess of impairment.

58. The Referee finds Mr. Crum's vocational analysis more persuasive than that of Dr. Collins. Dr. Collins' report was prepared in late 2004, when Claimant's fusion was still relatively recent. At the time that Mr. Crum prepared his report, in September 2006, Claimant was almost three years post-fusion. Mr. Crum had the benefit of additional information developed in Claimant's case subsequent to Dr. Collins' involvement that directly affected his

employability. This additional information included BAF's offers of modified work, and evidence suggesting that Claimant had greater facility communicating in English than was previously known. It was also particularly helpful that Mr. Crum analyzed Claimant's employability based on all three sets of restrictions.

59. The Referee finds that Mr. Crum's evaluation of Claimant's employability based on Dr. Phillips' restrictions to be the best measure of Claimant's disability in excess of employment. As Claimant's treating physician, Dr. Coughlin's restrictions would ordinarily be entitled to substantial weight. But Dr. Coughlin had not seen Claimant since May 2004, when Claimant was not even at MMI from his fusion. Dr. Coughlin's permanent restrictions, imposed quite early in Claimant's recovery from his ankle fusion, are not as compelling as the restrictions imposed by Dr. Phillips, who saw Claimant on two more recent occasions—in June of 2004 and again in April 2006. The fact that Dr. Coughlin was comfortable having Dr. Phillips rate Claimant's impairment, provides additional support for using Dr. Phillips' restrictions.

While the Referee considered the opinions of Dr. Yu regarding Claimant's restrictions, she found them less persuasive than the opinions of Dr. Phillips. This Commission has no familiarity with Dr. Yu or his qualifications. Because his office is in California, he sees Claimant only infrequently. He did not have access to all of the relevant medical records at the time he offered his permanent restrictions, and in fact, Dr. Yu's permanent restrictions were not consistent with the results of the FCE that he requested. Finally, Dr. Yu's opinions regarding Claimant's condition are based largely upon Claimant's subjective reports. There is little objective evidence in Dr. Yu's records that supports many of Claimant's complaints, the relationship between Dr. Yu's extremely limited lifting restrictions and Claimant's fused ankle

are never explained or justified, and Dr. Yu's diagnosis of RSD is entirely without objective clinical evidence.

60. Using Mr. Crum's vocational analysis and Dr. Phillips' permanent restrictions, the Referee finds that Claimant's permanent disability, inclusive of impairment, is 50%.

TOTAL PERMANENT DISABILITY

61. Claimant asserts that he is totally and permanently disabled.

> There are two methods by which a claimant may establish a permanent disability. First, a claimant may prove a total and permanent disability if his or her medical impairment together with the nonmedical factors total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. The total and permanent disability has been established at that stage. *See* Hegel v. Kuhlman Bros., Inc., 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd lot doctrine").

Boley v. State, Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857(1997).

Impairment Plus Non-Medical Factors

62. Because Claimant's medical impairment together with non-medical factors does not total 100% disability, Claimant cannot establish total and permanent disability by the first method set out in *Boley*.

Odd-Lot

63. When a claimant cannot establish total and permanent disability in the manner described in *Boley*, he may attempt to do so through the odd lot doctrine. An employee is disabled under the odd lot doctrine if he proves that, while he is physically able to perform some work, he is so handicapped that he would not be employed regularly in any well-known branch of the labor market absent a business boom, sympathy of a particular employer or friends,

temporary good luck, or superhuman effort on his part. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). An employee may prove total disability under the odd-lot worker doctrine in one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or, (3) by showing that any efforts to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging & Const.*, 127 Idaho 221, 224, 899 P.2d 434, 437 (1995). Claimant has failed to make a *prima facie* case that he is in odd-lot worker.

64. Claimant has not worked since his fusion, so Claimant cannot show that he has attempted other types of employment without success.

As discussed previously, Claimant never seriously searched for work. His efforts were limited to the minimum number of applications necessary to maintain his unemployment benefits, were not targeted to positions that were suitable for his skills and limitations, and his efforts were of short duration. During this limited employment search, Claimant stressed to potential employers his perception of his limitations, which exceeded even Dr. Yu's restrictions. Although two vocational counselors and one ICRD rehabilitation consultant were involved in his case, none were ever specifically retained to search for work on Claimant's behalf.

Finally, none of the vocational experts who were involved in Claimant's case ever opined that any attempt to find suitable work within the restrictions imposed by Dr. Phillips would be futile.

CONCLUSIONS OF LAW

1. Defendants are not liable for the cost of medical care provided to Claimant by Dr. Yu, or by physicians at the Shelley Medical Clinic prior to the date of this decision. However,

all of the medical professionals involved in this proceeding believe that Claimant will need some on-going medical monitoring for prescriptions and orthoses. Defendants are encouraged to identify an orthopedist in the Idaho Falls area to provide minimal on-going care related to Claimant's left ankle fusion.

2. Claimant has sustained permanent partial impairment (PPI) of 9% of the whole person.

3. Claimant has sustained permanent partial disability (PPD), inclusive of impairment, of 50% of the whole person.

4. Claimant has failed to establish that he is totally and permanently disabled, either because his impairment and other factors render him totally and permanently disabled, or, alternatively, because he is an odd-lot worker.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 18 day of May, 2007.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of May, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

GREG J MAESER
1920 E 17TH STE 103
IDAHO FALLS ID 83404

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

djb /s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FILIBERTO SOTELO, Claimant, v. THE PILLSBURY COMPANY, Employer, and LUMBERMAN'S MUTUAL CASUALTY COMPANY, Surety, Defendants.	)	**IC 1997-006770** **1998-018735** **ORDER** Filed: May 24, 2007

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Defendants are not liable for the cost of medical care provided to Claimant by Dr. Yu, or by physicians at the Shelley Medical Clinic prior to the date of this decision. However, all of the medical professionals involved in this proceeding believe that Claimant will need some on-going medical monitoring for prescriptions and orthoses.

2. Claimant has sustained permanent partial impairment (PPI) of 9% of the whole person.

3. Claimant has sustained permanent partial disability (PPD), inclusive of impairment, of 50% of the whole person.

4. Claimant has failed to establish that he is totally and permanently disabled, either because his impairment and other factors render him totally and permanently disabled, or, alternatively, because he is an odd-lot worker.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 24 day of May, 2007.

INDUSTRIAL COMMISSION

/s/_____
James F. Kile, Chairman

_Unavailable for signature_____
R.D. Maynard, Commissioner

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of May, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

GREG J MAESER
1920 E 17TH STE 103
IDAHO FALLS ID 83404

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

djb

/s/_____